No. 04-1144

In the Supreme Court of Texas

SHIRLEY NEELEY, TEXAS COMMISSIONER OF EDUCATION, THE TEXAS EDUCATION AGENCY, CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
Appellants,

v.

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT SCHOOL DISTRICT, PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT, DALLAS INDEPENDENT SCHOOL DISTRICT, AUSTIN INDEPENDENT SCHOOL DISTRICT, AND HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees.

On Direct Appeal from the 250th District Court, Travis County, Texas
Cause No. GV-100528

STATEMENT OF JURISDICTION

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of the Case 2

Argument 3

I. The Court Has Jurisdiction Over This Direct Appeal 3

II. The Court Should Exercise Jurisdiction Over This Important Appeal 5

A. School Finance Litigation Is of Undisputed Importance to the Jurisprudence and to the People of the State 5

B. Because the Court Will Ultimately Make the Final Decision on the Important Constitutional Issues Presented by This Case, Its Decision Should Be Made on Direct Appeal to Avoid Unnecessary Delay 5

C. The Importance of This Appeal Is Heightened by the Presence, for the First Time, of a Constitutional Adequacy Claim 6

Briefing Schedule 8

Conclusion 9

Certificate of Service 12

TABLE OF AUTHORITIES

Cases

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) 4-6

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) 5

Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) 5

Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (1995) 4, 5, 7

In re Long, 984 S.W.2d 623 (Tex. 1998) 6

Tex. Workers' Compensation Comm'n v. Garcia, 817 S.W.2d 60 (Tex. 1991) 4

West Orange-Cove Consolidated Independent School District v. Alanis, 107 S.W.3d 558 (Tex. 2003). 2, 3, 5, 7

Statutes, Rules, and Constitutional Provisions

TEX. CIV. PRAC. & REM. CODE §6.001 6

TEX. CONST. art. V, §3-b 4

TEX. GOV'T CODE §22.001(c) 3

TEX. R. APP. P. 57 4

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STATEMENT OF JURISDICTION

The Texas Education Agency, Commissioner of Education Shirley Neeley, the Texas State Board of Education, and Comptroller of Public Accounts Carole Keeton Strayhorn (collectively, the "State") have filed a direct appeal from the trial court's judgment, which enjoined the funding of Texas's public education system on the ground that the statutes governing the school finance system violate the Texas Constitution. Pursuant to Texas Rule of Appellate Procedure 57.3, the State asks the Court to note probable jurisdiction over this direct appeal, request briefing on the merits, and submit the appeal on an expedited basis.

STATEMENT OF THE CASE

This is the latest in the series of school finance cases this Court has considered since 1989. In contrast to previous school finance appeals, this is the first in which the Court will be asked to squarely determine whether Texas's system of public education is "adequate," that is, whether that system, as a whole, provides a "general diffusion of knowledge" as required by Article VII, §1 of the Texas Constitution.

This case returns on appeal following the remand for trial on the merits ordered by the Court in *West Orange-Cove Consolidated Independent School District v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003). That case had been filed by several property-wealthy school districts and alleged that the statutory $1.50 cap per $100.00 in property valuation on school district maintenance and operation (M&O) tax rates imposed a state ad valorem tax in violation of article VIII, §1-e of the Texas Constitution. *See id.* at 573.

A group of property-poor school districts, headed by Edgewood ISD, intervened as Defendants in the case, opposing the West Orange Cove claim that the $1.50 cap is unconstitutional. Edgewood also joined another group of property-poor districts, led by Alvarado ISD, in intervening as Plaintiffs to assert that Texas's school finance system is inadequate and inefficient under article VII, §1 of the Texas Constitution. *Id*. at 574.

The trial court granted the State's plea to the jurisdiction and special exceptions, dismissing the West Orange Cove Plaintiffs' article VIII, §1-e action because they had failed to state a claim. They appealed, and the court of appeals affirmed, but this Court reversed, holding that the West Orange Cove districts could state a claim under Article VIII, §1-e by

alleging that they were forced by the current system to tax at maximum rates in order to provide students with a general diffusion of knowledge or an accredited education. *Id*. at 580. On remand, the West Orange Cove Plaintiffs joined the Edgewood Intervenors and the Alvarado Intervenors in bringing an adequacy claim under Article VII, §1 of the Texas Constitution.

The case was tried, and the trial court ruled in favor of the Plaintiffs and the Intervenors on all but one claim. First, the trial court determined that the school finance system operates as a state property tax in violation of Article VIII, §1-e because the Plaintiffs lack meaningful discretion in setting their tax rates. Second, the court held that the money available to school districts is insufficient to allow them to provide a general diffusion of knowledge under Article VII, §1. Third, the court concluded that inequity in facilities funding among school districts violated the efficiency mandate of Article VII, §1. Finally, the court rejected the claim that inequities in maintenance and operations funding rise to the level of a constitutional violation.[1] On November 30, 2004, the trial court issued its written judgment and its findings of fact and conclusions of law.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS DIRECT APPEAL.

A party may directly appeal to this Court from a trial-court judgment or order that grants or denies an injunction on the ground of the constitutionality of a Texas statute. TEX.

1. On December 28, 2004, the Edgewood Intervenors challenged the trial court's resolution of this issue and asked the trial court to modify its judgment. That motion is still pending, and the State, joined by the West Orange Cove Plaintiffs, has urged the trial court to expedite its ruling.

GOV'T CODE §22.001(c); TEX. CONST. art. V, §3-b; *see also* TEX. R. APP. P. 57; *Tex. Workers' Compensation Comm'n v. Garcia*, 817 S.W.2d 60, 61 (Tex. 1991). That is precisely the type of judgment the trial court rendered here.

Specifically, on November 30, 2004, after a bench trial on the merits, the district court rendered a final judgment that enjoined the operation of the statutes governing the school finance system if the Legislature does not cure the constitutional defect by October 1, 2005. *See* Judgment at 3-4 (App. A). The court also issued declarations to that effect. *See id.*

In previous school finance cases, the Court has entertained direct appeals over similar orders that either enjoined or failed to enjoin the school finance system. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 489 n.1, 493 n.3 (Tex. 1992) ("*Edgewood III*") (accepting direct appeal over trial-court judgment declaring County Education District taxing system constitutional and refusing to enjoin its operation); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 727 (1995) ("*Edgewood IV*") (exercising jurisdiction over cross-appeals of trial-court judgment holding Senate Bill 7 constitutional but finding that the Legislature had failed to provide for constitutionally efficient facilities and enjoining the issuance of bonds for the construction of school facilities until such inefficiency had been cured).

For the same reason—because the trial court's judgment declares the school finance system unconstitutional and, on that ground, enjoins its operation—the Court has jurisdiction over this appeal.

II. THE COURT SHOULD EXERCISE JURISDICTION OVER THIS IMPORTANT APPEAL.

A. School Finance Litigation Is of Undisputed Importance to the Jurisprudence and to the People of the State.

The importance of this appeal to the jurisprudence of the State and to the people of the State is manifest. This Court has repeatedly confirmed the importance of school finance litigation by hearing five school finance appeals in the past fifteen years. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) ("*Edgewood I*") (appeal after court of appeals's review of final judgment); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 494 (Tex. 1991) ("*Edgewood II*") (although parties sought jurisdiction by direct appeal, this Court elected to review trial court's judgment as original mandamus proceeding); *Edgewood III*, 826 S.W.2d at 489 n.1, 493 n.3 (direct appeal); *Edgewood IV*, 917 S.W.2d at 727 (direct appeal); *West Orange-Cove*, 107 S.W.3d at 562-63 (appeal after court of appeals's review of interlocutory order). In the Court's own words, "[w]e are fully aware of the gravity of the issues raised by the present appeals and the singular importance of this litigation to the people of Texas." *Edgewood III*, 826 S.W.2d at 493.

B. Because the Court Will Ultimately Make the Final Decision on the Important Constitutional Issues Presented by This Case, Its Decision Should Be Made on Direct Appeal to Avoid Unnecessary Delay.

Swift conclusion of this litigation is also vital either to remove the cloud of unconstitutionality that has been cast over the system or to give the Legislature clear, authoritative guidance about how to cure any constitutional defect. The trial court's judgment is superseded during the pendency of the appeal. TEX. CIV. PRAC. & REM. CODE

§6.001; *In re Long*, 984 S.W.2d 623, 625 (Tex. 1998). Thus, the October 1, 2005 deadline is not operative against the State unless and until all appeals are exhausted and the judgment is affirmed. Nevertheless, this crucial issue deserves rapid resolution.

This Court has always been the final arbiter of school finance litigation, as demonstrated by its decisions in *Edgewood I*, *Edgewood II*, *Edgewood III*, *Edgewood IV*, and *West Orange Cove*. Given the virtual certainty that this Court will have the last word, requiring the parties to go first to the court of appeals would unnecessarily delay the final resolution of this litigation for little discernable benefit. That fact, combined with the "singular importance of this litigation to the people of Texas," *Edgewood III*, 826 S.W.2d at 493, warrants this Court's review on direct appeal.

C. The Importance of This Appeal Is Heightened by the Presence, for the First Time, of a Constitutional Adequacy Claim.

Previous school-finance appeals have dealt with only two constitutional issues: (1) whether the school finance system is "efficient" under Article VII, §1 of the Texas Constitution, and (2) whether the system amounts to a state property tax in violation of Article VIII, §1-e. This appeal presents a third constitutional issue as well: whether Texas's educational system provides an adequate education, *i.e.*, a "general diffusion of knowledge," under Article VII, §1. In previous school finance cases, the adequacy of the educational system had not been challenged, but was discussed by the Court in interpreting other constitutional provisions. In this case, however, adequacy has moved to the forefront, as an independent claim and as an important factor in the other claims. *See, e.g.*, *Edgewood IV*,

917 S.W.2d at 731 ("The State's duty to provide districts with substantially equal access to revenue [to satisfy the constitutional standard of efficiency] applies *only* to the provision of funding necessary for a general diffusion of knowledge."); *West Orange-Cove*, 107 S.W.3d at 581 ("The public school system the Legislature has established requires that school districts provide both an accredited education and a general diffusion of knowledge . . . because both are binding, a district may allege that taxation at a maximum rate in order to satisfy either is a[n unconstitutional] state ad valorem tax.").

Texas is a national leader in education, and Texas schools consistently perform among the best in the nation in educating a diverse population.[2] Nevertheless, the trial court declared that the Texas educational system fails to provide the constitutionally-required general diffusion of knowledge. *See* Judgment at 2 (App. A). And, giving essentially no deference to the Legislature, the trial court held that the State's accountability and accreditation system does not accurately measure whether a general diffusion of knowledge has been achieved. *See* Findings of Fact 17, 30-37 (App. B).

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2. There was extensive testimony at trial about Texas students' performance on the National Assessment of Educational Progress (NAEP), the preeminent national test described by Austin Independent School District Superintendent (and Plaintiffs' witness) Pat Forgione as "the gold standard for assessment." 5 RR 15. Although Texas students' raw scores on NAEP were, in the aggregate, roughly average as compared to students from other States, when those scores were compared to students from similar families, Texas children moved up dramatically in the rankings, placing in the top five in the nation in several areas. *See* Ex. 15862. Both plaintiffs' and defendants' experts agreed that comparing students with similar family characteristics (*i.e.*, whether low-income or limited-English-proficient (LEP))—rather than comparing raw scores alone—is the most accurate measure of the quality of a State's educational system. *See* testimony of Dr. David Armor, 27 RR 24-26; report of Dr. David Grissmer, Ex. 15862 at 1-2. Thus, even though States with wealthier, more homogeneous populations may have higher raw scores, Texas has one of the highest success rates of any State at educating its comparatively diverse, mixed-income population.

What constitutes a general diffusion of knowledge is the most important unanswered question in school finance litigation. By formulating the definition of this constitutional floor, and by clarifying the level of deference owed to the Legislature, the Court will chart the future of school finance litigation, determining whether the Legislature will retain its proper policy-making role, or whether the courts will supplant that role, effectively becoming judicial state boards of education that will set educational policy for the State.

BRIEFING SCHEDULE

In the event the Court elects to exercise jurisdiction over this appeal, the State, the West Orange Cove Plaintiffs, and the Alvarado Intervenors jointly request that the Court set the following briefing schedule: Appellants' Brief due 40 days after Court notes probable jurisdiction; Appellees' Brief due 40 days after filing of Appellants' Brief; and Appellants' Reply Brief due 20 days after filing of Appellees' Brief. The State, the West Orange Cove Plaintiffs, and the Alvarado Intervenors all believe that this schedule will allow the appeal to move forward in an expeditious fashion while affording the parties adequate time to provide the Court with thorough, helpful briefing.

If the Edgewood Intervenors' motion to modify the judgment, *see supra*, note 1, is still pending in the trial court at the time this Court issues a briefing schedule,[3] a supplemental briefing schedule could be set after the trial court rules on the sole issue raised in the motion, if and when an appeal regarding that issue is filed in this Court. In the meantime, the Court

3. Additionally, the Alvarado Intervenors have filed a motion in the trial court to reopen the evidence to permit the introduction of a newspaper article. The resolution of this request will not affect the substantive issues in the appeal and should not delay the briefing schedule.

should proceed in considering the discrete and important issues presented by the State's appeal. The Edgewood Plaintiffs oppose the issuance of a briefing schedule at this time.

CONCLUSION

The State respectfully requests that the Court note probable jurisdiction over this direct appeal, request briefing on the merits, and submit the appeal on an expedited basis in accordance with the suggested briefing schedule.

Respectfully submitted,

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